NO. 80391-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES DANIEL RADCLIFFE,

Petitioner.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Wm. Thomas McPhee, Judge
and Before the Honorable Richard D. Hicks, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PERTAINING TO PETITIONER'S ASSIGNMENTS OF ERROR

1. In *State v. Radcliffe,*[1] Division 2 of the Court of Appeals rejected the rule in *State v. Robtoy*[2] that when a suspect makes an equivocal request for an attorney, an officer must limit further questioning to clarifying that request. The Court of Appeals adopted the holding of the United States Supreme Court in *Davis v. United States,*[3] which provides that after a knowing and voluntary waiver of *Miranda*[4] rights, an officer may continue questioning unless and until a suspect unequivocally requests an attorney. Should this Court follow *Davis* and reject *Robtoy* in cases involving a post-waiver equivocal request for counsel?

2. Does Article I, § 9 of the Washington Constitution provide a broader right to counsel than the Fifth Amendment of the United States Constitution in cases involving an equivocal request for counsel?

B. STATEMENT OF THE CASE

A jury convicted James Radcliffe in 2006 of two counts of third degree rape of a child, and one count of indecent liberties with forcible compulsion. Clerk's Papers [CP] at 200, 201, 202, 203-215. Report of Proceedings [RP] at 1101.

In November 2004, when 16-year-old S.K. was visiting her mother, appellant James Radcliffe took her to a friend's house. RP at 419.

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[1] 139 Wn. App. 214, 159 P.3d 486 (2007).
[2] 98 Wn.2d 30, 653 P.2d 284 (1982), *cert. denied,*494 U.S. 1031; 494 U.S. 1061; *reh'g denied,*495 U.S. 966, 110 S. Ct. 2579, 109 L. Ed. 2d 761 (1990).
[3] 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).
[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

He was accused by S.K. of rubbing his penis against her buttocks until he ejaculated on her. RP at 436. A few days later, S.K. reported the alleged offense to police and gave them the clothing she had worn at the time. RP at 164-65, 268-69, 352.

Radcliffe was arrested by police on November 17, 2004, and taken to a police station in Lacey, Washington. RP at 416. An officer testified that he administered Radcliffe his constitutional warnings, but did not ask him any questions. RP at 416. Radcliffe was questioned in the interview room at the Lacey Police Department the morning of November 17 by Detective Shannon Barnes. RP at 628, 629. Barnes read Radcliffe his warnings pursuant to *Miranda* and informed him of the accusations against him. RP at 630-31. Barnes stated that Radcliffe said that he was willing to talk to her, and that he denied the accusations and told her that while he was with S.K. on November 13, his wallet fell out and S.K. had got it and was hiding it behind her back, and that the only contact he had with S.K. was to reach around her to get it back. RP at 631, 632-33.

After approximately ten minutes, Barnes turned the questioning over to Detective David Miller. Miller went into the interview room in order "to confront Mr. Radcliffe with the fact that [S.K.] stated that he had ejaculated on her jeans and that we would be able to test those for DNA." RP at 635. Miller did not administer *Miranda* warnings. RP at 726.

Miller told Radcliffe that the pants turned over to police by S.K. were being tested for DNA. RP at 715. He stated that Radcliffe admitted that testing would reveal that he had ejaculated on S.K.'s clothing and that he had had a sexual relationship with S.K. RP at 716. He said that Radcliffe said that he did not have intercourse with S.K., but that he pulled her pants down while she was sitting with her back to him, and that "he rubbed his penis on her buttocks until he ejaculated[,]" and that it had been consensual. RP at 716, 734. He said that Radcliffe said the sexual relationship with S.K. started when she was 14, and that he had intercourse with her on two occasions—once about two years prior on a camping trip. RP at 717. He testified that Radcliffe told him that S.K. would perform oral sex on him on an average of once per month. RP at 717.

When Miller said that he would get a tape recorder to record Radcliffe's story, Radcliffe said "I don't know how much trouble I'm in, and I don't know if I need a lawyer." RP at 736.

At a suppression hearing on October 3, 2005, Miller said he told Radcliffe that he could not give him legal advice and offered to read his rights to him. RP (10.3.05) at 99. He told Radcliffe that "if he didn't feel comfortable giving a taped statement, he could write me a statement out, and if he didn't [feel] comfortable doing that, he could just tell me it and I

would type it into my report." RP (10.3.05) at 99-100.

On review, Division 2 held that Radcliffe's statement to police that he did not know if he needed a lawyer was equivocal regarding whether defendant was asking to speak to a lawyer, and that *Davis*, not *Robtoy*, is the controlling authority on the application of Miranda when a suspect makes an equivocal request for counsel, and that law enforcement therefore was not obligated under the fifth amendment to stop the questioning or to clarify Radcliffe's statement. *State v. Radcliffe,* 139 Wn. App. 214, 159 P.3d 486 (2007).

C. ARGUMENT

1. THIS COURT SHOULD APPLY *ROBTOY/EDWARDS* AND REJECT *DAVIS* IN CASES INVOLVING POST-WAIVER EQUIVOCAL REQUESTS FOR COUNSEL.

a. The constitutional provisions at issue.

The Fifth Amendment guarantees a defendant the right to remain silent and the right to the presence of an attorney.

The Fifth Amendment provides:

> . . . nor shall [any person] be compelled in any criminal case to be a witness against himself . . .

This provision applies to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

Article I, § 9 of the Washington Constitution provides that "[n]o person shall be compelled in any criminal case to give evidence against himself."

b. Post-waiver equivocal requests for counsel should continue to be controlled by *Robtoy*.

The fifth amendment prohibition against compelled self-incrimination requires that a custodial interrogation be preceded by advice to the accused that he or she has the right to remain silent and the right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The person being interrogated, however, may validly waive the right to counsel. *Miranda*, 384 U.S. at 465. In order for such a waiver to be valid, the fifth and sixth Amendment waivers must be voluntary, knowing, and intelligent. *Edwards v. Arizona*, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981), which address the fifth amendment; *Patterson v. Illinois*, 487 U.S. 285, 292, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988) (which addresses the sixth amendment). The validity of a waiver depends upon the particular facts and circumstances surrounding that particular case, including the background, experience, and conduct of the person being interrogated. *Edwards*, 451 U.S. at 482.

In *Edwards*, the Supreme Court held that once a suspect has

"clearly" asserted his right to counsel, the police may not subject him to further questioning until he has had an opportunity to confer with counsel, unless the suspect himself initiates further communication. *Edwards*, 451 U.S. at 484-85.

i. *State v. Robtoy*

This Court addressed equivocal references to counsel under the fifth and fourteenth amendments in *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982). *Robtoy* creates a limited exception when an accused makes an "equivocal" request for an attorney. *Robtoy,* 98 Wn.2d at 38-39. In *Robtoy*, this Court adopted the Fifth Circuit's rule from *Nash v. Estelle*, 597 F.2d 513 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 409 (1979), that when a suspect makes an equivocal request for an attorney, an officer must limit further questioning to clarify the request for counsel. *Robtoy*, 98 Wn.2d at 38-39 (citing *Nash*, 597 F.2d at 517-18). An equivocal request is a request that "expresses both a desire for counsel and a desire to continue the interview without counsel." *State v. Quillin,* 49 Wn. App. 155, 159, 741 P.2d 589 (1987), *rev. denied,* 109 Wn.2d 1027 (1998).

ii. *Davis v. United States*

In 1994, the United States Supreme Court directly addressed equivocal references to counsel in *Davis v. United States*, 512 U.S. 452,

114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). In *Davis,* the defendant, whom the Naval Investigative Service suspected of murder, was issued his *Miranda* warning and expressly "waived his rights to remain silent and to counsel, both orally and in writing" upon being taken into interrogation. *Davis*, 512 U.S. at 455. "About an hour and a half into the interview," after the defendant apparently began to suspect that the interrogation was not going well for him, said to his interrogators, "Maybe I should talk to a lawyer." *Id.* The investigating agents asked whether this meant that he was asking for a lawyer, to which the suspect replied, "No, I don't want a lawyer." *Id.* The interrogation then continued.

The five-member court majority held that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* at 459. (Emphasis in original). The majority further expressly "decline[d] to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id.* at 461-62.

The Court did not extend the *Edwards* rule to equivocal requests for an attorney, holding that to do so would needlessly prevent the police

from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present. *Davis*, 512 U.S. at 459-60.

iii. *State v. Aten*

The *Davis* ruling did not resolve the question of ambiguous or equivocal requests for counsel in Washington. Two years later in *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996), a plurality of four justices in this Court, after concluding that the State did not present sufficient evidence to establish the *corpus delicti* of the crime, applied *Robtoy* without discussing *Davis*. This Court concluded that the defendant's statements made after an equivocal request for counsel were admissible because the defendant had herself initiated further communication. *Aten*, 130 Wn.2d at 662, 665-66 (plurality). Four concurring justices of this Court reasoned that, in light of the conclusion that the State had not established the *corpus delicti*, it was unnecessary to discuss any further issues. *Aten*, 130 Wn.2d at 668 (Madsen, J., concurring).

iv. Division 2's pre-*Radcliffe* decisions in *Copeland* and *Jones*.

In *State v. Copeland*, 89 Wn. App. 492, 949 P.2d 458 (1998), the Division 2 applied the rule from *Davis* that officers need not stop questioning a suspect after an equivocal reference to counsel. *Copeland*, 89 Wn. App. at 500-01. But in *State v. Jones*, 102 Wn. App. 89, 6 P.3d

58 (2000), Division 2 said that "Washington follows *Edwards* but not *Davis*." *Jones*, 102 Wn. App. at 96.

v. *State v. Walker*

In 2006, in *State v. Walker*, 129 Wn. App. 258, 275, 118 P.3d 935 (2005), *review denied sub nom. State v. Garrison*, 157 Wn.2d 1014 (2006), Division One opted to follow *Davis* and held that

> where a suspect has received *Miranda* warnings the invocation of the right to remain silent must be clear and unequivocal (whether through silence or articulation) in order to be effectual; if the invocation is not clear and unequivocal, the authorities are under no obligation to stop and ask clarifying questions, but may continue with the interview.

Walker, 129 Wn. App. at 276.

In *Radcliffe*, Division 2 held that that *Davis*, not *Robtoy*, is the controlling authority on how *Miranda* applies to a suspect's equivocal request for an attorney. *Radcliffe*, 139 Wn. App. at 224.

Davis, however, does not fully resolve the issue of equivocal requests for counsel in Washington. *Davis* appears to leave undisturbed the requirement to ask clarifying questions prior to waiver when a defendant makes an ambiguous invocation prior to a waiver of rights. *Davis* concerned an equivocal reference to counsel, followed by a clear statement that he did not want an attorney. *Davis*, 512 U.S. at 455. Davis was given his constitutional warnings, and then later he said to his

interrogators, "Maybe I should talk to a lawyer." *Id.* The agents asked whether this meant that he was asking for a lawyer, to which he replied, "No, I don't want a lawyer." The Court found that police did not have to ask clarifying questions and that they are not required to cease questioning the suspect. *Id.* at 459. In other words, if the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him. *Id.* at 461-62.

The *Davis* court, however, addressed itself narrowly to the facts of that case. The application of *Davis* requires that it take place after a knowing and voluntary waiver of *Miranda* rights; it is limited to post-warning cases. In *United States v. Rodriguez*, 518 F.3d 1072, 2008 U.S. App. LEXIS 5059 (March 10, 2008), the Ninth Circuit differentiated between pre-waiver and post-waiver equivocal requests for counsel. The Court stated:

> In other words, the "clear statement" rule of *Davis* addresses only the scope of invocations of *Miranda* rights in a *post-waiver* context. It is well settled that "[i]nvocation and waiver [of *Miranda* rights] are entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith v. Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 83 L. Ed. 2d 488 1984). *Davis* addressed what the suspect must do to *restore* his *Miranda* rights after having already knowingly and voluntarily waived them. It did not address what the police must obtain, in the initial waiver context, to begin questioning.

Rodriguez, 2008 U.S. App. LEXIS 5059 at *13. (Empahsis in

original).

Division 2's ruling in *Radcliffe* does not recognize the distinction delineated in *Rodriguez* between a pre- and post-waiver equivocal request for counsel.

2. THIS COURT SHOULD FIND THAT *DAVIS* IS INAPPLICABLE BECAUSE ARTICLE I, § 9 OF THE WASHINGTON CONSTITUTION AFFORDS GREATER PROTECTIONS THAN THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Davis applies to the fifth amendment; the applicability of the case has not been tested in the context of our state's constitution. The Washington constitution may afford greater protection against self-incrimination than the federal constitution in the context of equivocal requests for counsel. This Court should, therefore, review the applicability of *Davis* as it is applied through article 1, § 9 of the Washington Constitution.

The sixth amendment also protects against self-incrimination. Here, Radcliffe was questioned and his statement was given before formal charges were filed. The right to counsel under const. art I, § 22 (amend. 10) attaches only after the initiation of formal judicial proceedings. *Heinemann v. Whitman Cy.*, 105 Wn.2d 796, 799-800, 718 P.2d 789 (1986); *accord, Tacoma v. Heater*, 67 Wn.2d 733, 736, 409 P.2d 867

(1966) (right to counsel is the same under the sixth amendment and const. art. I, § 22 (amend. 10)). Therefore, Radcliffe's right to counsel under the sixth amendment and const. art. 1, § 22 (amend. 10) had not yet attached. *Kirby v. Illinois*, 406 U.S. 682, 688-89, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972).

The Fifth Amendment to the United States Constitution provides, in part, no person "shall . . . be compelled in any criminal case to be a witness against himself." This provision applies to states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). Wash. Const. art. I, § 9 states: "no person shall be compelled in any criminal case to give evidence against himself." This Court has previously interpreted the two constitutional provisions equivalently. *State v. Earls*, 116 Wn.2d 364, 375, 805 P.2d 211 (1991; *State v. Foster*, 91 Wn.2d 466, 473, 589 P.2d 789 (1979); *State v. Mecca Twin Theater & Firm Exch., Inc.*, 82 Wn.2d 87, 507 P.2d 1165 (1973). Radcliffe submits, however, that the Court should apply independent state constitutional grounds in this case, and that Article I, § 9 of the Washington Constitution provides greater constitutional protection.

In *Earls*, 116 Wn.2d at 374-75, this Court declined to consider the issue of whether article I, § 9 should be independently interpreted even though a *Gunwall* analysis was provided. The *Earls* majority held that the

issue of whether Washington's constitutional provision afforded greater protection than the fifth amendment had already been decided in *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971), and that that the protection of article I, § 9 is coextensive with that of the fifth amendment. *Earls*, 116 Wn2d at 374-75. However, because *Earls* and *Moore* did not explicitly pertain to the admissibility of the fruits of an equivocal invocation of rights following administration of warnings, Radcliffe submits that these cases do not preclude an independent interpretation of Washington's constitution. See, *State v. Russell*, 125 Wn.2d 24, 58, 882 P.2d 747(1994). This Court noted that

> [a] determination that a given state constitutional provision affords enhanced protection in a particular context does not necessarily mandate such a result in a different context. Similarly, when the court rejects an expansion of rights under a particular state constitutional provision in one context, it does not necessarily foreclose such an interpretation in another context.

Russell, 125 Wn.2d at 58 (citing *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990)).

Earls pertained to the validity of an express waiver of constitutional rights, while *Moore* involved the issue of whether the privilege against self-incrimination extended to use of the accused as a source of physical evidence such as blood samples, an issue that is quite different than the issue of an equivocal request for counsel. The *Gunwall*

analysis in *Earls* did not resolve the issue of scope of protection of article I, § 9 in the context of an equivocal request for counsel.

This Court has set forth six nonexclusive factors to consider in determining whether, in a given case, the state constitution affords greater protection. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). These factors are:

> (1) textual language, (2) differences in texts, (3) constitutional history, (4) pre-existing state law, (5) structural differences, (6) matters of particular state or local concern.

Gunwall, 106 Wn.2d at 58.

a. *Gunwall* factors 1 and 2 support analysis under the State Constitution.

Under the state constitution "no person shall be compelled in any criminal case to give evidence against himself . . ." const. art I, § 9. The parallel federal provision states "nor shall [any person] be compelled in any criminal case to be a witness against himself . . .". U.S. Const. amend. V. Thus, the difference is between "giving evidence" (state constitution) and "being a witness" (federal constitution). In *Moore*, this Court held that this difference in language is without meaning. *Moore*, 79 Wn.2d at 55-57. In that case, this Court determined that the purpose of each provision to prohibit the compelling of self-incriminating testimony from a party or witness. *Moore*, 79 Wn.2d at 56; see also, *Earls*, 116 Wn.2d at

376. In the dissenting opinion in *Moore*, it was noted that the framers of the state constitution had originally drafted a provision using language similar to that found in the federal constitution, but instead adopted the different "give evidence" language. The dissent concluded in *Moore* that the change in language signified that the state framers intended an independent interpretation of the state constitution. *Moore*, 79 Wn.2d at 65 (Rosellini, J., dissenting); See also, *Earls*, 116 Wn.2d at 390-91 (Utter, J., dissenting).

b. State Constitutional and Common Law History.

The United States Constitution was adopted without a Bill of Rights. The Bill of Rights followed as amendments to the Constitution. In Washington, the Bill of Rights is found in Article I of the State Constitution. The sources of the Bill of Rights of the Washington Constitution were fundamental rights derived from other state constitutions whose origins were in pre-Revolutionary common law. *State v. Earls*, 116 Wn.2d at 391-92. (Utter, J. dissenting, citing: Justice Robert F. Utter, *Freedom and Diversity in the Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 496-97 (1984).

Thus, the fact that article I of the state constitution was based

primarily on language from other states' constitutions and common law, rather than from the federal constitution, supports an independent interpretation of article I, § 9.

c. Preexisting State Law.

Washington courts have historically held that in the absence of *Miranda* warnings a statement is necessarily coerced. See, *State v. Lavaris*, 99 Wn.2d 851, 664 P.2d 1234 1983), where this Court stated that [a]ny form of custodial interrogation is inherently coercive. Therefore, any confession obtained in the absence of proper *Miranda* warnings is by definition "coerced"—regardless of how "friendly" the actual interrogation. (Citations omitted.) *Lavaris*, 99 Wn.2d at 857.

This Court rejected a *Gunwall* analysis in *State v. Russell,* 125 Wn.2d 24, 882 P.2d 747 (1994) in part upon a finding that cases cited by *Russell* have all involved interpretation of *Miranda,* which is a federal judicial decision. *Russell,* 125 Wn.2d at 60. This court noted that it has never held that *Miranda* warnings are independently required under the state constitution, and that the "state law" cited by *Russell* is to a large degree based on federal law and that because the holdings that "Russell relies have been around only since 1969" that they were supplanted by *State v. Wethered,* 110 Wn.2d 466, 473, 755 P.2d 797 (1988) and therefore do not represent long-held principles of law. *Russell,* 125 Wn.2d at 61.

Radcliffe notes that Washington courts have upheld the exclusionary rule under the Washington Constitution long before the decision in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961); *State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922), and *State v. Miles*, 29 Wn.2d 921, 190 P.2d 740 (1948). Further, Washington Courts have applied the rule to situations beyond those of illegal searches and seizures. See, generally, *State v. Bonds*, 98 Wn.2d 1, 9-12, 653 P.2d 1024, (*cert. denied,* 464 U.S. 831, 104 S. Ct. 111, 78 L. Ed. 2d (1983), and cases cited therein; *State v. White*, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982). One of the explicit purposes of the exclusionary rule in Washington is to deter the police from acting unlawfully. It also preserves the dignity of the judiciary by refusing to consider evidence by police misconduct. *Bonds*, 98 Wn.2d at 12.

In addition, the existence of a court rule that mandates a right to counsel "as soon as feasible" after being taken into custody further demonstrates the state's interest in this fundamental protection for its citizens. CrR 3.1.

d. Structural Differences of the Constitutions.

The state constitution *limits* powers of state government, while the federal constitution *grants* power to the federal government. *Gunwall*, at

66. This difference favors an independent state interpretation in every *Gunwall* analysis. *State v. Russell*, 125 Wn.2d at 61.

e. Particular state or local concern.

This final factor strongly supports an independent state analysis. Washington courts have historically applied the exclusionary rule broadly and long before the rule was required under the federal constitution. In *Bonds*, 98 Wn.2d at 9, this court summarized the ways in which Washington law has generally "extended the exclusionary rule beyond the original Fourth Amendment context". For example, this Court adopted an exclusionary rule decades before the requirement was extended to the states in *Mapp v. Ohio*, *supra*, and Washington has extended the rule to statutory violations as well. *Bonds*, 98 Wn.2d at 9-10.

In addition, as noted in the *Earls* dissent, criminal law in general involves local, not national, concerns. *See Earls*, 116 Wn.2d at 396-97 (Utter, J., dissenting).

Thus, this factor as well as all of the other *Gunwall* factors supports an independent state interpretation on the issue of whether the state can use the fruits of a custodial statement made following an equivocal request for counsel.

Article I, § 9 should be interpreted to be more protective of the right to counsel than afforded under the current interpretations of the fifth

amendment. Such an independent state analysis is necessary to maintain the law as it has been for many years in Washington. The evidence derived from Radcliffe's illegally-obtained custodial statement should have been suppressed.

D. CONCLUSION

For the foregoing reasons, Radcliffe respectfully requests that this Court reverse his convictions and remand this matter for a new trial.

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Respectfully submitted,

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